

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. I.8, s 275
AND IN THE MATTER OF the *Arbitration Act*, 1991, S.O. 1991, c. 17
AND IN THE MATTER OF an arbitration between:

Intact Insurance Company

Applicant

And

The Co-Operators General Insurance Company

Respondent

AWARD

COUNSEL

Joseph Lin, counsel for the Applicant, Intact Insurance Company (hereinafter called Intact).

Stas Bodrov, counsel for the Respondent, The Co-Operators General Insurance Company (hereinafter called Co-operators).

INTRODUCTION

This matter comes before me pursuant to s. 275 of the *Insurance Act* and Regulation 664 as amended. This is a dispute between two automobile insurers with respect to a claim for loss transfer arising out of an accident that occurred on September 12, 2019.

Counsel on consent have appointed me as their arbitrator pursuant to s. 275(4) of the *Insurance Act*, Regulation 664 and the *Arbitration Act*. Counsel signed an *Arbitration Agreement* dated October 18, 2024.

By way of background, on September 12, 2019 a 2014 Chrysler insured by Intact was involved in a motor vehicle accident with a 2016 GMC truck pulling a trailer driven and owned by Vasile Burdilov and insured by Co-operators.

Intact took the position that the Co-operators vehicle met the definition of a "heavy commercial vehicle" under s. 275 of the *Insurance Act* and Regulation 664 and therefore loss transfer was applicable.

There is no dispute before me with respect to liability or quantum at this time.

Intact argues that Co-operators accepted that its vehicle involved in the incident was a heavy

commercial vehicle and accepted its responsibility for loss transfer under s. 275 of the *Insurance Act*. Co-operators acknowledges that it initially accepted loss transfer but on the mistaken belief that their vehicle was a heavy commercial vehicle. Co-operators seeks to retract its acceptance of loss transfer. Intact takes the position that Co-operators cannot resile from their acceptance and this results in the matter being brought before me.

PROCEEDINGS

This hearing was conducted in writing and as well both counsel had an opportunity to make oral submissions. Counsel submitted Factums, a Joint Book of Documents, the Agreed Statement of Facts, case law as well as their Arbitration Agreement.

The Joint Book of Documents included a Motor Vehicle Accident Report, the OCF-1 submitted by the claimant, various letters between Co-operators and Intact with respect to loss transfer, copies of the Notification of Loss Transfer and Request for Loss Transfer Indemnification. In addition, both parties submitted their respective client's log notes.

There was no oral evidence nor were there any transcripts of examinations under oath of any representative of the parties. The parties also did not file any statements.

ISSUE FOR DETERMINATION

While the Arbitration Agreement sets out the issues for my determination in very broad terms, in fact the key issue before me is:

Has Co-operators waived its right to deny and dispute loss transfer following its acceptance of loss transfer by letter dated January 12, 2021? And if it has waived its right, should Co-operators be permitted to retract that waiver?

AWARD

I conclude that Co-operators has waived its right to deny and dispute the loss transfer with respect to the claim of Intact arising out of the accident of September 12, 2019 and that in the circumstances of this case Co-operators does not have the right to retract that waiver. I find that Co-operators has an obligation to reimburse Intact for reasonable statutory accident benefits paid to the claimant pursuant to s. 275 of the *Insurance Act* and Regulation 664.

FACTS

On September 12, 2019 the claimant was driving his 2014 Chrysler insured by Intact under a standard automobile policy.

The claimant was travelling northbound on Main Street West. A truck and trailer insured by Co-operators was travelling southbound on Main Street West. The two vehicles were involved in a

collision near the intersection of Main Street West and Minor Road in Port Colborne.

The claimant sustained injuries and applied for statutory accident benefits from Intact. He submitted his OCF-1 in or around October 10, 2019. The OCF-1 identified that the accident occurred when a pickup truck towing a flatbed trailer travelling westbound lost control and resulted in a head-on collision.

In accordance with the Statutory Accident Benefits Schedule Intact has and continues to pay various accident benefits to the claimant.

By letter dated February 10, 2020 Intact wrote to Co-operators putting them on notice of a claim for loss transfer. The letter identified Co-operators insured as Vasile Burdilov and provided a policy number of 4000810675/001673855.

The letter included a Notification of Loss Transfer and a copy of the Police Report. The letter indicated that Intact was putting Co-operators on notice of their claim for loss transfer and that a request for indemnification would be sent should the claim exceed the \$2,000 deductible.

The Police Report included Co-operators' insured's name, the plate number of the vehicle, the colour, the make and the body style was described as "flat". The Police Report also noted that the flatbed was "unloaded".

The Notification of Loss Transfer was dated February 10, 2020 and also provided the claim number, policy number, name of the insured and identified the class of vehicle as being "heavy commercial". The notification indicated that Intact was claiming that Co-operators' insured was responsible for the accident under Fault Determination Rule 10.4. It indicated that accident benefits were being paid to the claimant for medical expenses, other expenses, attendant care, loss of earning capacity and other disability.

According to Co-operators' log note on February 6, 2020 Co-operators received a call from TPA (third party adjuster). The note indicates that an individual at Co-operators spoke with a TP AB adjuster who advised that she wanted to put their policy on for loss transfer. The name of the adjuster and contact information were noted in the log. The person who received the call indicated they would open up an AB claim for loss transfer.

Co-operators' log notes indicate that the claim was assigned to an AB adjuster who noted on February 7, 2020 that once the loss transfer documents were received that she would "confirm vehicle and trailer/possible contents qualify as a heavy commercial vehicle." Her note also indicated that "Confirm TP does not have heavy commercial vehicle on auto policy."

In a further log note from Co-operators dated February 25, 2020 the adjuster indicates that the AB file has been set up as a precaution in case loss transfer could be applicable but they had not received any notice to date. The plan is "CR will quietly monitor until a notification for TP insurer is received."

For some reason it appears that Co-operators did not receive the February 10, 2020 letter from Intact.

On March 19, 2020 the adjuster notes "No claim for LT presented to us to date. CR is monitoring quietly."

There is no indication that during this time Co-operators made any effort to contact their insured to determine the size or weight of the vehicle or to make any other enquiries as to whether loss transfer would apply. No efforts were made to see if the vehicle was available to be weighed if needed.

In the meantime, the Intact adjuster had made a log note on February 10, 2020 indicating that in their view loss transfer applies as there was a vehicle and trailer involved. There did not appear to be any further investigation by Intact into the weight of the vehicle and trailer. The adjuster noted that the letter had been sent to Co-operators and that they were waiting to see if Co-operators accepted loss transfer.

On March 18, 2020 the Intact adjuster resent the Notification of Loss Transfer to Co-operators via fax. Once again Co-operators did not appear to receive it as there is no note of its receipt in their log notes. Intact resends it again on April 17, 2020 and then a fourth time on May 19, 2020.

According to Co-operators' log notes, they finally received the Notification of Loss Transfer on May 19, 2020 dated February 2020. Co-operators acknowledges that this may have been faxed to them previously but they have no note of it.

Co-operators does not appear to do anything on receipt of the Notification of Loss Transfer. As a result, once again Intact resends the Notification of Loss Transfer on June 19, 2020. The Intact adjuster also calls Co-operators and is given the name of an individual who is being assigned the file. The Intact adjuster e-mails the Co-operators adjuster and receives a bounce-back indicating that the individual will be away until June 30.

It is not until July 16, 2020 that we see a log note from Co-operators' adjuster with respect to the loss transfer claim that has been assigned to her. In this note Co-operators' adjuster indicates that she has spoken to the BI adjuster and confirmed that their insured is 100% at fault for the accident. She also reviews the Police Report noting that the other vehicle is a private passenger vehicle. She also notes that they are now investigating whether the 2016 GMC truck/van Sierra 2500 meets the definition of heavy commercial vehicle as it is listed on their policy as a light commercial vehicle. However, she notes there is the added weight of a "dump trailer" attached to the truck. She therefore reaches out to the property damage adjuster to see if the specifications of the vehicle are available. It appears they are not. She does some online research which suggests that the vehicle on its own weighs approximately 4,500 kg or just under and therefore with an added trailer weight it would meet the definition of heavy commercial vehicle. The Co-operators adjuster notes "This claim appears to meet criteria for accepting loss transfer

at 100% for AB purposes."

The same day the Co-operators adjuster calls the Intact adjuster advising that they have received the Notification of Loss Transfer and that they will be responding shortly.

Co-operators then e-mails Intact on August 13, 2020 and requests further information from Intact including the information that Intact has confirming the Co-operators vehicle involved in the incident meets the definition of heavy commercial vehicle. The e-mail suggests that Co-operators' information is that the vehicle in question was a light commercial vehicle towing a trailer and therefore they require further information that Intact has in support of their position.

On July 28, 2020 the Co-operators adjuster notes that she has reviewed the vehicle damage photos on file and that she does not have specs of the trailer that it was pulling at the time of the accident. She notes she has reached out to the PD adjuster again to confirm no photographs are available of the trailer and she also notes that she is going to reach out to the insured to see if there is any further information on the trailer that can be provided. She notes "At this time our file information confirms a light commercial vehicle towing a trailer. It appears LT will most likely apply, however would like to obtain as much information as possible prior to formally accepting."

On September 2, 2020 the file is reviewed at Co-operators and it is noted that the plan for the adjuster is to advise Intact that their vehicle is not a flatbed vehicle but is rated a light commercial vehicle and at the same time the adjuster is to reach out to the insured to enquire what was in the back of the truck, any tools, equipment or passengers, whether any materials were being carried that day and the approximate weight.

Intact follows up with Co-operators on September 16, 2020 with respect to Co-operators' position noting that if loss transfer is not applicable that Intact would like to receive relevant documents showing the weight and class of the vehicle.

The Co-operators adjuster responds on November 3, 2020 by e-mail advising that she hopes to have a formal response with respect to their loss transfer determination shortly. She states "At this time we are currently investigating the contents of the trailer attached to the 2016 GMC truck involved in the accident to verify the gross vehicle weight."

The adjuster attempted to call Mr. Burdilov on November 2, 2020 as he had not responded to previous e-mail requests. She spoke to a family member, introduced herself and indicated she was looking to speak to Mr. Burdilov with respect to the vehicle weight and its contents of the trailer at the time of the MVA.

In a log note of November 17, 2020 the Co-operators adjuster notes that she has been unsuccessful in trying to contact the insured directly by phone or e-mail. They have sent a formal letter out to him now enquiring about the gross weight of the vehicle and trailer involved in the accident. She notes "Email correspondence or verbal confirmation from claimant may be sufficient to verify trailer contents and weight. Online research seems to verify that the GMC

vehicle on its own is approximately the 4,500 kg, or just under, any added trailer weight would most likely meet the heavy commercial vehicle definition."

By letter dated December 4, 2020 Co-operators wrote to Intact and advised that based on their investigation into the motor vehicle accident that they must deny loss transfer. They advised that their insured owns a 2016 GMC truck van under the policy but that the vehicle in question was a light commercial vehicle and that they have not received any information from Intact to support that the vehicle and attached trailer meets the definition of heavy commercial vehicle.

In a log note dated January 4, 2021 the Co-operators adjuster notes "Insured has verified GVW does not exceed 4,500 kg." Apparently Co-operators received an e-mail from the insured advising the gross vehicle rating for the truck is 4,490 kg and therefore it does not exceed the heavy commercial vehicle rating requirement for loss transfer. She advised in the e-mail that the trailer was a 5 ton dump trailer made by Misk Trailers and that the trailer was empty at the time. The adjuster indicates that she is going to send that information to her supervisor to confirm it is appropriate to maintain a denial of loss transfer.

The Co-operators adjuster also e-mails the Intact adjuster on December 22, 2020 enclosing a copy of their denial letter and providing a further explanation that Co-operators has not been able to obtain any information to verify the weight of the vehicle in question and the attached trailer and that it exceeds the gross weight of 4,500.

There does not appear to be any response by Intact by e-mail, letter or phone call to the Co-operators denial letter.

In a log note of January 12, 2021 the Co-operators adjuster indicates that she has reviewed the vehicle weight with the added trailer and noted that their previous investigation did not account that the combined weight would clearly exceed the heavy commercial vehicle rating. Now that Co-operators has this information they decide to accept loss transfer and send out a request for proof of payment and indemnification. That letter is dated January 12, 2021 from Co-operators to the Intact adjuster. Notably, the letter states:

"We have now received information that the vehicle and attached trailer meet the definition of a heavy commercial vehicle as defined in s. 9(1) of Regulation 664 heavy commercial vehicle.

This is to confirm that we are accepting loss transfer at 100%.

Please provide us with your first request for indemnification including proof of payments. Please advise the status of your claim with all submissions in order that we may promptly reserve our file."

Intact responds by letter dated February 19, 2021 to Co-operators enclosing a copy of the first loss transfer request for indemnification in the amount of \$37,897.96 net of the \$2,000

deductible.

On April 5, 2021 the Intact adjuster leaves a message for the Co-operators adjuster noting that indemnification remains outstanding and that "File too large to send via e-mail." This would appear to be the AB file.

On May 4, 2021 Intact again follows up with Co-operators with respect to indemnification which is still outstanding.

According to the Co-operators log notes there is no additional investigation during this time and there does not appear to be any explanation why indemnification has not been processed other than Co-operators' request for documents and information such as the OCF-1, copies of expense invoices and whether there are any optional benefits available.

However, on April 8, 2021 a new adjuster reviews the file and speaks to a specialist at Co-operators with respect to the issue of the weight of the vehicle. It is noted by this adjuster that it appears the calculation of the gross vehicle weight had been done incorrectly. It is noted that the curb weight of their vehicle is 2,467 kg and the curb weight empty of the 5 ton trailer is 1,295 kg for a total of 3,762 kg which is short of the required 4,500+ for loss transfer to apply. There is a conversation with the original adjuster and she is advised that she should have been using the curb weight and empty trailer weight and not the gross vehicle weight rating for the truck and trailer. The e-mail indicates there is discussion as to whether or not their loss transfer acceptance can be reversed.

On April 27, 2021 Co-operators writes Intact and advises that they are now denying loss transfer. The key portion of the letter states:

"Please note, we have reviewed our file information further and confirm that the vehicle and attached trailer, verified to be empty at the time of the accident, does not meet the definition of a heavy commercial vehicle as defined in s. 9(1) of Regulation 664 heavy commercial vehicles."

By e-mail dated July 22, 2021 the Intact adjuster advises Co-operators they will not accept the denial. They repeat that with the truck and trailer the weight of the insured vehicle is such that loss transfer would be applicable. They note the truck alone per their search weighs 4,491 kg.

Co-operators responds by letter dated August 27, 2021 confirming their position that the gross weight does not exceed 4,500 kg and they are maintaining their denial.

Intact then issues a notice demanding arbitration dated October 8, 2021.

SUBMISSIONS OF THE PARTIES

Submissions of Intact

Intact takes the position that Co-operators does not have the right to resile from their acceptance of loss transfer.

Intact submits that in the letter of January 12, 2021 Co-operators clearly accepted loss transfer at 100% and that letter was clear and unequivocal in terms of conveying a conscious intention to waive any reliance on the weight of the truck as a defence to the claim for loss transfer.

Intact further submits that Co-operators is a sophisticated player in the role of automobile insurance including loss transfer and in its letter it used language that one would expect to see between sophisticated parties who were routinely involved in these disputes. Intact notes that the letter was unequivocal in communicating that Co-operators was accepting loss transfer and wanted to resolve any dispute with respect to loss transfer and that Co-operators is ready to waive any disputes with respect to the applicability of s. 275 of the *Insurance Act* and move forward with dealing with indemnification requests.

Intact notes the decision of the Supreme Court in Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Insurance Company* [1994] 2 SCR 490 wherein it was noted that a waiver can only be found “where the evidence demonstrates that the waiving party (1) had full knowledge of rights and (2) an unequivocal and conscious intention to abandon them (see para 20). Intact submits that the evidence is abundantly clear here that Co-operators had full knowledge of its rights and its accepting letter displayed the unequivocal and conscious intention to abandon them.

Intact also argues that the facts of this case are such that in all the circumstances Co-operators should not be permitted to resile from its agreement. Only in extreme cases should an arbitrator intervene and allow a party to withdraw from an agreement (*Motors Insurance Corporation v. Old Republic Insurance Company* (November 2008, Arbitrator Guy Jones) affirmed [2009] OJ No. 3005 (SCJ)). The facts of this case, submits Intact, are not ones where an arbitrator should intervene and allow a party to withdraw.

The letter from Co-operators of January 12, 2021 was quite clear that the gross weight of the vehicle and the attached trailer were, according to Co-operators, compliant with the definition of heavy commercial vehicle as defined in s. 9 of Regulation 664.

Intact points to the decision of Arbitrator Densem in *Intact Insurance Company v. St. Paul Fire and Marine Insurance Company* (decision November 4, 2013) which dealt with the meaning of “gross vehicle weight” under s. 9(1) of Regulation 664. Arbitrator Densem conducted a thorough review of all the case law in this area and concluded that “gross vehicle weight” means the actual weight of the vehicle at the time of the accident including the load in the vehicle and its occupants. In other words, it did not mean the gross vehicle weight rating for the truck and trailer but rather the actual weight/curb weight.

Intact submits that even if Co-operators accepted loss transfer based on either erroneous

information or an erroneous understanding of the meaning of “gross vehicle weight” that still does not justify permitting Co-operators to resile from the acceptance of loss transfer.

Intact points again to the comments of Arbitrator Densem in the St. Paul Fire case (*supra*) wherein he states:

“Making allegedly erroneous assumptions about facts without conducting any or an inadequate investigation of them, or not advertng to facts in its possession, does not amount to a ‘mistake of fact’ that an insurer can rely upon to deny liability for a claim it has otherwise unequivocally accepted.”

Intact submits that Co-operators had more than enough time to fully investigate the gross weight of the vehicle and trailer involved in this accident. It was under no compulsion to accept loss transfer when it did. In fact, it had previously denied loss transfer. If Co-operators was unsatisfied with the evidence available to it it could have continued its investigation and continued to maintain a denial until it was satisfied with respect to the vehicle weight.

Intact also submits that at no time was Co-operators induced by Intact into accepting any evidence from them about the weight of the vehicle or the trailer. The information relied upon by Co-operators when it accepted loss transfer was entirely within their control.

To summarize Intact's key points:

1. Co-operators had full knowledge of its rights as a sophisticated insurer at the time of the letter of January 12, 2021.
2. The January 12, 2021 letter demonstrates an unequivocal and conscious intent to abandon their rights with respect to claiming the gross weight of the vehicle as a defence under s. 275.
3. With respect to whether the waiver has been retracted within a reasonable time, Intact relies on my decision in *Aviva and Economical*, April 5, 2024 that this part of the waiver test is not applicable to loss transfer claims but in any event Co-operators has not discharged its burden to support that the waiver was retracted within a reasonable time.
4. It would be unfair to allow the retraction of the waiver. To allow a retraction requires compelling evidence to set it aside to justify the application of equitable relief. Co-operators had time to investigate and communicate with Intact to test any theories it had about the weight and chose to accept loss transfer. To refuse Co-operators' waiver in the circumstances of this case is consistent with the policy behind loss transfer. If Co-operators is allowed to revoke its waiver simply because it suggests it made a mistake in investigation, it will lead other insurers to doing the same leading to increased uncertainty, unnecessarily long and drawn-out litigation and increased expenses and costs associated with the resolution of these types of disputes which are intended to be

resolved quickly and efficiently between representatives of insurance companies.

Submissions of Co-operators

Co-operators submits that on the facts of this case it should be permitted to withdraw its acceptance of loss transfer and that to do so would be in compliance with the criteria set down in *Saskatchewan River Bungalows v. Maritime (supra)* as interpreted by Arbitrator Lee Samis in the case of *Waterloo Insurance Company v. ACE/INA Insurance Company* (April 19, 2018).

Co-operators submits that it accepted loss transfer based on incorrect information and once it recognized its error it acted swiftly to address the issue and request a retraction.

With respect to the mistake Co-operators takes the position that the handling adjuster did not use the curb weight of the vehicle in determining whether the vehicle classified as a "heavy commercial vehicle" under s. 9(1) of Regulation 664. Co-operators accepted loss transfer on the adjuster's belief that the gross weight of the vehicle was rated at 4,490 kg and with a trailer attached it would clearly exceed the 4,500 kg threshold for heavy commercial vehicle.

It was not until April 7, 2021 when a supervisor at Co-operators reviewed the file and found the mistake had been made with respect to the use of the gross vehicle weight rating for the truck versus the curb weight. The supervisor determined that the curb weight of the vehicle together with the weight of the trailer would be 738 kg less than the required weight and even if one took into account weight of the driver, the fuel and some possible modifications which were still unknown, it would not reach the weight threshold of 4,500 kg.

Co-operators confirmed that its assessment for the gross weight was based on the VIN search of the vehicle.

It is also of considerable importance that both in their Factum and in oral submissions Co-operators acknowledged that even now neither party has been able to ascertain the exact weight of the vehicle and whether it meets the definition of a heavy commercial vehicle under s. 9(1). If Co-operators is permitted to resile from its acknowledgment of loss transfer, that would be an issue for determination by the arbitrator.

With respect to the law, Co-operators also points to the decision of the Supreme Court in Canada in the *Saskatchewan River Bungalow v. Maritime* case and Arbitrator Samis's decision in *Waterloo v. ACE (supra)*.

Co-operators acknowledges that the Supreme Court in the *Saskatchewan River Bungalows* case set down a two-part test for establishing waiver. Firstly, the party waiving their right must have had full knowledge of their rights and secondly, the evidence must demonstrate an unequivocal and conscious intent to abandon those rights.

Co-operators, properly in my view, acknowledges that it meets the two-part test for waiver. Co-

operators agrees it is a sophisticated insurer and that it had full knowledge of its rights when it sent its letter out accepting loss transfer on January 12, 2021.

Co-operators also properly acknowledges that the evidence is clear that their letter at that time was clear and unequivocal and that there was a conscious intent to abandon those rights. Therefore, these two criteria and whether or not Co-operators did in fact waive its rights are not an issue.

Co-operators' position is that it is the remaining two criteria that are significant in this case and that should in their view result in a decision that Co-operators should be permitted to retract their acceptance and retract their waiver.

Referring again to the Supreme Court of Canada decision in *Saskatchewan River Bungalows*, Co-operators points to the two criteria that if established would allow a waiver to be retracted.

The first is whether reasonable notice is given and the second is whether the reasonable notice has the effect of protecting reliance by the person in whose favour the waiver operates.

Co-operators relies heavily on the decision of Arbitrator Samis in the *Waterloo* case. In that case, Arbitrator Samis concluded that the insurer had waived its rights but also concluded that in the circumstances of the case before him they had a right to retract as the request for retraction had been made in a reasonable time and there was no prejudice to the other party. Co-operators submits that the facts of this case closely align with the decision of Arbitrator Samis. Co-operators submits that exactly 3.5 months after its acceptance of loss transfer it wrote to Intact denying loss transfer and retracting their earlier acceptance. Co-operators submits that as soon as their mistake was identified and reconciled with accurate information Intact was immediately notified. Co-operators did not sit on that information.

With respect to prejudice, Co-operators submits that it did not pay any amounts towards indemnification to Intact which were the same facts as in the *Waterloo* case. Therefore, there was no undue reliance by Intact on Co-operators' acceptance. Further, Co-operators submits Intact has not presented any evidence of prejudice or detrimental reliance. Co-operators submits I should not infer prejudice where there is no evidence of prejudice.

Co-operators also addressed my decision in *Aviva and Economical* which was relied upon by Intact and Co-operators suggests errors in that decision.

In that case, as in this one, the issue was whether an insurer who had accepted loss transfer based on their understanding of the weight of their insured's vehicle could later retract from that acceptance when they received new information about the weight of the vehicle. I concluded that they could not. In that case, there was also no dispute that the insurer had clearly waived their rights in accordance with criteria 1 and 2 of the *Saskatchewan River Bungalows* decision. However, Co-operators points to my conclusions with respect to criteria 3 and 4 and whether they are applicable to the loss transfer regime. Co-operators suggests that my analysis was

wrong. In that case I concluded, based on the decision of the Court of Appeal in *Intact Insurance Company of Canada v. Lombard General Insurance Company*, 2015 ONCA 764 that equitable relief would not apply to loss transfer. I noted that the Court of Appeal had upheld Justice Chiappetta's decision wherein she concluded "the right to loss/transfer indemnity is purely statutory and unlike the statutory provision considered in Perry, it does not have a 'distinctively equitable flavour'". The Court of Appeal accepted Justice Chiappetta's decision and also concluded "loss transfer is not an equitable claim nor a claim for equitable relief." Based on that I concluded I could not apply criteria 3 and 4 from the *Saskatchewan River Bungalows* case to a case for loss transfer.

Co-operators in this case noted an important distinction between the *Intact v. Lombard* case (*supra*) and the loss transfer cases dealing with waiver. In the *Intact v. Lombard* case the court was looking at the issue of laches. In *Intact v. Lombard* the responding insurers were relying on the common law principle of laches to import the principle of limitation in an equitable form as a defence to a loss transfer claim. The responding insurer acknowledged that the enabling legislation did not include a limitation period but that the common-law principle of laches should be imported into the loss transfer regime to in effect create a substantive limitation defence where one had not been created on a statutory basis.

Co-operators submits that in the *Intact v. Lombard* case the Court of Appeal rejected the notion that the principle of common-law equitable limitation period is not a defence that can be imported into a loss transfer context because it is a regime that is a creature of statute and therefore is governed by its enabling legislation. If the policymakers of the legislation did not import a limitation period then one cannot import a common-law equitable limitation period into that statutory framework. Co-operators also points out that the court in that case did not consider or reference the *Saskatchewan River Bungalows* case. Therefore, Co-operators says I should not rely on or feel bound by my own prior decision but rather I should now follow Arbitrator Samis's decision in *Waterloo* (*supra*) and consider the issue of waiver on reasonable notice and prejudice. Co-operators submits that if I do that then the evidence should lead me to a conclusion that equitable relief is applicable to loss transfer and that Co-operators gave notice within a reasonable period and as there is no prejudice to Intact, I should allow the retraction of the waiver.

It should also be noted that Co-operators submits that if I do not accept their submissions on the errors in my earlier decision, that there is still a right to grant equitable relief in loss transfer matters. Co-operators submits that this private arbitration process is governed by the *Arbitration Act: 1991* and that under s. 31 of that Act I am specifically granted the power to decide a dispute in accordance "with law, including equity, and may order specific performance injunctions, and other equitable remedies."

Lastly, Co-operators points to paragraph 13 of their Arbitration Agreement which specifically grants me power to issue a decision in accordance with the provisions of the *Arbitration Act* thus empowering me to grant equitable relief where appropriate.

Co-operators requests an order that they be permitted to retract from their waiver, that this preliminary matter be dismissed and the loss transfer matter move forward to be heard on its merits which would include whether or not the vehicle involved met the definition of “heavy commercial vehicle”.

ANALYSIS AND DECISION

Loss transfer is a statutory scheme under s. 275 of the *Insurance Act* and Regulation 664 which was created in order to allow for a reasonably quick and efficient transfer of risk between certain insurers where there are collisions between certain types of vehicles. It recognizes that in certain circumstances vehicles of a certain class that come into contact with another vehicle will likely suffer more significant damage. These classes of vehicles include motorcycles and heavy commercial vehicles. Section 275(1) is set out below:

“The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurer of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefit arose benefits arose.”

Section 9(1) of Regulation 664 defines heavy commercial vehicle as “a commercial vehicle with a gross vehicle weight greater than 4,500 kg”. There is no definition of “gross vehicle weight”. As noted by Arbitrator Guy Jones in his decision *Motors v. Old Republic (supra)*, this statutory scheme, in order to meet its obligations of a quick and efficient transfer of risk between these insurers, puts a premium on speed and efficient resolution of loss transfer claims. The users of this system are sophisticated in their understanding of loss transfer and in the litigation of loss transfer matters.

I agree with Arbitrator Jones where he stated:

“In such a system it is desirable, once an agreement has been reached, that it be enforced, except in the most extreme circumstances.”

I keep these policy considerations in mind as I approach my analysis and decision in this matter. As I said in my decision (*Aviva and Economical, supra*) loss transfer cases are approached on the basis it is a “quick and dirty” method to efficiently and promptly assess entitlement to loss transfer based on the statutory regulation and on the Fault Determination Rules. To read into the legislation, the right of an insurer to retract an acceptance of loss transfer and waiver of its right to dispute loss transfer based on errors made by an adjuster will result in some significant uncertainty and potential delay in loss transfer matters. I also stated that in my view it would allow adjusters who are dealing with loss transfer claims to sit comfortably handling the file with the knowledge that they need not have all the necessary information available to them and/or

thoroughly investigate the matter before they accept loss transfer. If waiver is allowed simply on the basis of a mistake, then the certainty and efficiency and costliness of the loss transfer system is at risk.

In this case Co-operators argues that they waived their right to dispute loss transfer on the grounds that the vehicle in question did not meet the gross vehicle weight. Co-operators has admitted in their materials and in their oral submissions that they had full knowledge of their rights when they wrote their acceptance letter in January 2019 and that that letter itself demonstrated an unequivocal and conscious intent to abandon their rights.

Co-operators rests their argument in this case on the *Saskatchewan River Bungalows* criteria as applied by Arbitrator Samis in Waterloo and ACE/INA that they should be permitted to retract their waiver as they gave Intact reasonable notice of their intention to do so and that it would otherwise be unfair not to permit the waiver as there is no evidence of prejudice with respect to Intact.

I find that in the circumstances of this case that the evidence does not meet those "extreme circumstances" referred to by Arbitrator Jones to support granting a retraction of the waiver nor do I find that Co-operators retracted the waiver on reasonable notice. In my view, one of the aspects of analysis of the reasonable notice issue is also whether there was a reasonable investigation prior to the acceptance of the loss transfer and then leading up to the retraction. This is consistent with not only comments by Arbitrator Jones but also Arbitrator Densem (*Belair and Northbridge, supra*), Arbitrator Bialkowski (*SGI v. Old Republic*, October 29, 2024) and the comments of Justice Herman when she affirmed Arbitrator Jones's decision in *Motors Insurance Corporation v. Old Republic Insurance Company*, [2009] O.J. No. 3005.

I find in this case that Co-operators did not complete an adequate investigation. Co-operators was aware that it was a requirement of loss transfer that the vehicle they insured involved in the loss satisfied the definition of heavy commercial vehicle. This was the threshold requirement that had to be met for s. 275 of the *Insurance Act* to apply. This should have been the key area of Co-operators' investigation. Indeed, Co-operators understood this as reflected in the communications between Co-operators and Intact. Early on there are numerous references to Co-operators requiring further information and investigation into whether or not their insured vehicle meets the threshold criteria. They request information from Intact. They attempt to get information from their insured. The adjuster notes on July 20 that while it appears loss transfer is likely going to apply, they "would like to obtain as much information as possible prior to formally accepting".

It was not until November 2020 that the adjuster attempted to get hold of their insured although earlier e-mails may have been sent. This accident occurred on September 2019 and there is no explanation why it took almost a year for Co-operators to try to track down their insured and collect the relevant information. Co-operators' log notes confirm that on February 6, 2020 they were advised by Intact that they were putting Co-operators on notice that there was a claim for loss transfer.

For whatever reason, the log notes show little done by Co-operators between February 6, 2020 and the late fall of 2020 when some investigations appear to have been done. Co-operators appears to have chosen a “wait and see approach” as indicated by their log notes “CR will quietly monitor until a notification for TP insurer is received”.

The Intact log notes are clear that numerous requests for loss transfer were forwarded to Co-operators over the course of the six months post-accident yet there was no explanation from Co-operators as to why none of those are either noted in their log notes or clearly indicated as received.

There was no evidence presented as to why Co-operators did not on February 6, 2020, after being advised of this loss transfer claim, immediately contact their insured and arrange with him to take a statement and get information with respect to the weight of the vehicle and the trailer on the date of loss and/or seek to weigh the trailer and the vehicle if available or further clarify whether this vehicle would or would not qualify as a heavy commercial vehicle.

I agree with Intact that there was absolutely no obligation on Co-operators in these circumstances to accept loss transfer in their letter of January 4, 2021. The only information Co-operators received prior to that acceptance was an e-mail from their insured which provided the gross vehicle rating for his vehicle. This was information that had already been noted in Co-operators' log notes based on their own research (see log note July 16, 2020). Co-operators could have maintained its denial set out in its letter of December 4, 2020 and forced Intact to proceed to an arbitration in order to establish the gross vehicle weight. I do note on the issue of the definition of gross weight that Arbitrator Densem's decision confirming that gross weight means the actual weight of the vehicle including the load and its occupants had been released in 2013. Co-operators as a sophisticated insurer who deals frequently with loss transfers in my view is deemed to be aware of the law in this area and mistakenly did not make efforts to determine actual weight and chose to rely on the gross vehicle weight rating.

This in my view does not amount to a mistake of fact that an insurer can rely upon to deny applicability of s. 275 of the *Insurance Act* having unequivocally accepted it earlier.

In my view, in looking at whether the waiver was retracted within a reasonable time, one must not only look at the time between the acceptance of the applicability of loss transfer and the date of the retraction, but one must look at the overall picture starting from the date of the notice of loss transfer and what was done by the insurer prior to its acceptance and then subsequent to its acceptance and up to the retraction. In this case I find that between February 6, 2020 when Co-operators received the call from the Intact adjuster noting that they were putting Co-operators on notice of a claim for loss transfer up until their ultimate acceptance of loss transfer of January 4, 2021 Co-operators failed to do some very basic investigations that would have allowed them to determine at an early stage what the actual vehicle weight was or at least a close approximation. While Co-operators promptly notified Intact of their resiling from the loss transfer once a senior adjuster reviewed the file and found the mistake, that in my view is not

enough. Co-operators accepted loss transfer by letter dated January 12, 2021 and the retraction letter was April 27, 2021. Certainly that was a prompt retraction from the finding of the alleged mistake of April 8 but there is no explanation as to why the information ultimately secured on April 8 could not have been secured by Co-operators at a much earlier time. Therefore, I conclude that there was a failure to reasonably investigate the issue of gross weight of the vehicle and that the notice given to Intact was not reasonable. I note Arbitrator Samis in the *Waterloo v. ACE/INA* decision when looking at the issue of the timeliness of the retraction looked at whether or not the responding insurer made a determination within a reasonably prompt timeframe. In other words, he looked at how long it took the insurer in that case to determine it made a mistake and then advise about that mistake.

I now turn to the question as to whether it would be unfair to allow the retraction of the waiver. When Arbitrator Samis reviewed this issue in *Waterloo v. ACE/INA*, he felt that the question of unfairness was in relation to the party claiming loss transfer. He could find no evidence before him of any actual prejudice to Waterloo. In that case however, if the respondent was permitted to withdraw their waiver (as indeed Arbitrator Samis ordered), Waterloo would still have the right to pursue its rights in loss transfer. There was no time limit. The issue before him was a question of law and whether or not loss transfer applied to a pedestrian and therefore it was not the type of claim whose value or evidentiary information would be lost with the passage of time.

In the case before me I find it would be unfair to Intact to allow Co-operators to withdraw from the waiver. While certainly Intact would have the right to continue to pursue the claim against Co-operators and argue loss transfer based on a heavy commercial vehicle, I find that Intact has lost the opportunity to investigate actual weight of the vehicle due to the passage of time and its reliance on Co-operators' acceptance of the loss transfer.

As other arbitrators have pointed out, the evidence as to whether a vehicle meets the criteria of the threshold definition of "heavy commercial vehicle" lies primarily in the hands of the party that insures that vehicle. They have access to their policy information. They have a clear understanding as to what vehicles are insured. They can contact their policyholder or the driver of the vehicle and conduct statements and arrange to have the vehicles weighed, pictures taken and full investigation to be completed. The first party insurer advancing the claim for loss transfer does not have that opportunity or at least not without it being on a consensual basis with the other insurer and their insured.

Intact in this case would have had an opportunity to look at the police report, speak to the investigating officer and review any police photographs. The only evidence before me is that Intact had the police report and a description of the vehicle and relied on that information to put forward the position that loss transfer applied. They provided that information to Co-operators by way of a letter on February 10, 2020 identifying the name of Co-operators' insured, the policy number and a copy of the police report which included the plate number of the vehicle, the colour, the make and the body style and the fact that there was a flatbed hooked to it which was unloaded. Intact in later communications asked Co-operators to provide them with any information that would support a position that the vehicle and trailer involved in the incident

would not meet the threshold requirement of 4,500 kg. That information was never provided by Co-operators. It was not until December 4, 2020 when Co-operators actually denied loss transfer advising that they believe the 2016 GMC truck was a light commercial vehicle and that they had not received any information “from Intact” to support that the vehicle and trailer met the definition of heavy commercial vehicle. This was more than one year subsequent to the motor vehicle accident and almost nine months after Intact had notified Co-operators of their claim. I have no evidence before me as to whether Intact started to make some investigations on receipt of the letter of December 4, 2020. However, it seems unlikely as on January 4, 2021 Intact received Co-operators' letter on January 12, 2021 confirming that they were accepting loss transfer. In reliance on that letter of January 12, 2021, Intact then responded on February 19 by enclosing loss transfer requests for indemnification.

As we know, the parties admit at this hearing that even now they do not know what the actual weight of this vehicle and its trailer was on the date of loss. That to my mind is evidence of clear prejudice to Intact in terms of its reliance upon Co-operators' investigation and acceptance of the loss transfer. I conclude it would be unfair in the circumstances of this case to allow Co-operators to resile from its acceptance of loss transfer.

I now turn to commenting on Co-operators' position with respect to my decision in *Aviva and Economical* and whether or not equity applies to considerations of waiver and retraction as suggested by Arbitrator Samis in *Waterloo v. ACE*.

I have carefully reviewed the submissions of Co-operators and their insightful arguments distinguishing the Court of Appeal decision and its comments on the equitable jurisdiction of loss transfer in a laches and limitation cases versus the matter before me. While I would have still decided *Aviva and Economical* in the same manner as I did when I rendered my decision in that matter, I now conclude that in loss transfer cases an arbitrator does have jurisdiction to consider equitable arguments such as retraction of waiver and the relevant criteria as set out by the Supreme Court of Canada in *Saskatchewan River Bungalows (supra)*. I have relooked at Arbitrator Samis's decision in *Waterloo v. ACE/INA (supra)* and I agree with his comments that all four criteria set out in *Saskatchewan River Bungalows* are to be considered in a loss transfer case when a second party insurer is seeking to retract an alleged waiver.

I also agree with Co-operators that I have authority under the *Arbitration Act* s. 31 to consider equitable relief and that while loss transfer is clearly a creature of statute, that does not prohibit an arbitrator to consider equitable factors when dealing with loss transfer claims.

AWARD

Co-operators waived its right to deny and dispute loss transfer based on its letter of January 12, 2021 and it is not permitted to retract that waiver and accordingly Co-operators is responsible for paying reasonable loss transfer indemnification to Intact subject to any liability arguments or quantum arguments.

COSTS

According to the Arbitration Agreement, legal costs and the costs of the arbitration are to be determined by the arbitrator taking into account the success of the parties, any offers to settle and the conduct of the proceedings.

In this matter I am not aware of any offers to settle. Intact was wholly successful in this matter and accordingly Co-operators will pay Intact's legal costs and Co-operators will also be responsible for the expenses of the arbitrator and the expenses of the arbitration if any.

If the parties cannot agree on costs they are to contact me and we will schedule a costs hearing.

DATED THIS 14th day of April, 2025 at Toronto.



Arbitrator Philippa G. Samworth
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